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AUGUST 1, 97
Paper No. 14
EJS

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

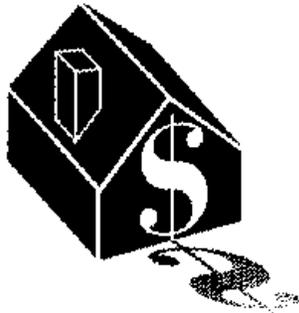
In re **Countrywide Funding Corporation**

Serial No. 74/612,941

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Countrywide Funding Corporation
David M. Mermelstein, Trademark Examining Attorney, Law
Office 103 (Michael A. Szoke, Acting Managing Attorney)

Before Cissel, Seeherman and Walters, Administrative
Trademark Judges.
Opinion by Seeherman, Administrative Trademark Judge:

Countrywide Funding Corporation has appealed from the
refusal of the Trademark Examining Attorney to register the
design mark, shown below, for "financial services; namely a
home equity line of credit program."¹



¹ Application Serial No. 74/612,941, filed December 1, 1994,
and asserting dates of first use of November 14, 1994.

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark, as used in connection with its identified services, so resembles the design mark shown below, and registered for "providing mortgages for the purchase of real estate along with the usual and customary ancillary services in providing mortgage funds,"² as to be likely to cause confusion or mistake or to deceive. The registered mark is described as consisting "of a stylized dollar sign circumscribed by a square with rounded edges; the circumscribed dollar sign being contained within a silhouette of a house."



Applicant and the Examining Attorney have both filed briefs.³ An oral hearing was not requested.

² Registration No. 1,859,957, issued October 25, 1994.

³ In his brief the Examining Attorney has objected to consideration of third-party registrations and applications because they were obtained from a private company's data base, rather than from the records of the Patent and Trademark Office. The Examining Attorney is correct that to make third-party registrations of record a party should submit copies of the

In any determination of the issue of likelihood of confusion, two key considerations are the similarity of the marks and the goods or services. With respect to the latter, there is no dispute that applicant's financial services, namely a home equity line of credit program, and the registrants' service of providing mortgages for the purchase of real estate, and ancillary services in providing mortgage funds, are closely related. In fact, applicant does not even discuss this factor in arguing that confusion is not likely.

This brings us to a consideration of the marks. Both applicant's and the registrant's marks are designs, and it is well established that when design marks are involved, the case must be decided primarily on the basis of visual similarity of the marks. **In re Burndy Corporation**, 300 F.2d 938, 133 USPQ 196 (CCPA 1962). It is true that here both marks consist of a house on which a dollar symbol is superimposed. However, the combination of the dollar symbol and the house design are highly suggestive for both applicant's and registrant's services, indicating as it does

registrations taken from the paper or computerized records of the Patent and Trademark Office. However, in this case, applicant submitted the registrations and applications both with its response to the first Office action, and with its request for reconsideration of the second Office action, and in neither instance did the Examining Attorney advise applicant of any deficiency with respect to the submissions, at a time when the applicant could have remedied the problem. We therefore deem the Examining Attorney to have waived any objection to the submission of the third-party registrations and applications and to have, by his actions, treated these materials as being of record.

that, in the case of applicant's services, a consumer may obtain money by essentially taking out a mortgage on one's house, while in the case of registrant's services, that money is being provided for the purchase of a house, i.e., that the consumer is taking out a mortgage for the purchase of a house. The highly suggestive nature of a dollar symbol and house for such services is borne out by the third-party registrations and applications for marks containing the combination of these design elements which were made of record by applicant. Although these registrations and applications are not competent to prove that the marks shown therein are in use or are known to the consuming public, they are competent to show that these elements have well-known meanings, and that the inclusion in each mark of these elements may be an insufficient basis upon which to predicate a holding of a likelihood of confusion. See **Cutter Laboratories, Inc. v. Air Products and Chemicals, Inc.**, 189 USPQ 108 (TTAB 19775).

Applicant has discussed at great length the differences it perceives between its mark and that in the cited registration. We cannot agree that consumers will notice or remember all the points of dissimilarity enunciated by applicant. For example, the fact that applicant's mark has a chimney on the left side, and the registrant's on the right, is not likely to serve to distinguish the marks. Under actual marketing conditions consumers do not have the luxury to make side-by-side comparisons between marks, and

instead they must rely on hazy past recollections. **Dassler KG v. Roller Derby Skate Corp.**, 206 USPQ 255 (TTAB 1980).

Having said this, however, we find that the marks, when viewed in their entireties, do convey different commercial impressions. The registered mark is a two-dimensional, simplistic picture of a house, depicted in the manner that a child might draw it. Further, the dollar symbol in this drawing is unusually thick, and has the appearance of the letter "S." That connotation is reinforced by the fact that the registrant's name is State Financial Network. In addition, the dollar symbol appears within a border, which is somewhat like a letter "O."

In applicant's mark, on the other hand, the house is shown in a three-dimensional view, and the logo has a sleek, modern look. The dollar sign, too, is very different from that in the cited mark. Moreover, the shadow of the dollar sign adds an incongruous note, in that this shadow is so oddly juxtaposed to the house that it could not be caused by any implied light source.

We have considered the possibility that the registered mark could be an elevation view of the side of applicant's house, but we think it unlikely that most consumers would see the marks in this fashion, or would make such a connection. Consumers are not likely to mentally turn designs on their sides and change their perspectives. Moreover, as we noted above, the differences in the dollar symbols also distinguish the marks.

The courts have long recognized that the determination of whether design marks are sufficiently different that they would not be likely, if in concurrent use, to cause confusion, is a subjective opinion. See **In re Burndy Corporation**, supra. Thus, prior case decisions involving design marks are of little help in reaching a conclusion in this case. We do note, however, that in several other cases which involved design marks comprising arbitrary elements, there was a finding of no likelihood of confusion because of the differences in appearances of the designs. See, for example, **Johann Maria Farina v. Chesebrough-Pond, Inc.**, 470 F.2d 1385, 176 USPQ 199 (CCPA 1972) (no likelihood of confusion found between three-petal crest design and flower design marks); **In re Anderson Electric Corporation**, 370 F.2d 593, 152 USPQ 245 (CCPA 1967) (no confusion found between two letter "A" design marks; **In re Samuel M. Gertman Co., Inc.**, 180 USPQ 336 (TTAB 1973) (no confusion found between two letter "G" design marks). We think a similar finding is similarly justified in the present case, where the design which comprises the marks of applicant and registrant is not arbitrary, but highly suggestive. In this connection, we reiterate the well-established principle of trademark law that highly suggestive, and therefore weak marks are entitled to a more limited scope of protection than arbitrary marks.

Another factor supporting our finding of no likelihood of confusion is the care with which both applicant's and

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registrant's services would be purchased. Obtaining a mortgage, whether for the purchase of a home or to obtain credit through what is a mortgage on one's home, is not an impulse purchase. Thus, we must assume that the marks would be viewed with greater care than would be the care with an inexpensive purchase.

Finally, we would point out that in reaching our decision we have given no weight to applicant's assertion that "a number of similar marks are now and have long been in concurrent use without actual confusion." Brief, p. 9. The third-party registrations upon which applicant relies to support this argument are, as we stated previously, not evidence that the marks shown therein are in use, or that the public is aware of them.

Decision: The refusal of registration is reversed.

R. F. Cissel

E. J. Seeherman

C. E. Walters
Administrative Trademark Judges
Trademark Trial and Appeal Board